No. 7829

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Antonio Rocchia,
Appellant,

vs.

United States of America,
Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

On November 14, 1933, the Grand Jury returned an indictment against Frank Ferrari, Silvio Cappi and Antonio Rocchia charging them in the first six counts with violating certain sections of the Internal Revenue Act relating to the possession of a still without registering the same; failure to give notice and file bond; carrying on business of a distiller with intent to defraud the United States of taxes; making and fermenting mash and the manufacture of alcohol. Count seven of said indictment charges said defendants with conspiracy to violate said sections of the Internal Revenue Act. (Tr. 2.)

Antonio Rocchia was the only defendant on trial. The jury returned a verdict of guilty on the first

six counts of said indictment and disagreed on the seventh count thereof.

The premises in question were located at 60 Brady Street, San Francisco, California, and consisted of a concrete building having a 50 foot frontage and a depth of 100 feet. The building had two front entrances. One entrance consisted of a sliding door divided into three sections and for convenience may be called the main door. The upper part of this doorway was glass. The other entrance was at the extreme right of the building, consisted of a door of ordinary size and for convenience may be called the small door. In the front of the building and attached to it was a sign indicating some kind of a drayage business. There was no sign to indicate that the business engaged in that building might be a distillery. (Tr. 94.)

On January 9, 1933, about 4:30 p. m., John M. Burt, Keith DeKalb and William P. Goggin, investigators in the Alcohol Tax Unit, Bureau of Internal Revenue, visited said premises. Investigator Goggin had received information that there was a distillery in operation therein. While said investigators were on the street in front of said premises they detected a strong odor of distillation and fermenting mash. (Tr. 94.) The investigators approached the main door and heard the sound of burners and blowers inside the building. It was a roaring sound common to a gas burner when it is operating under pressure. They looked through the glass portion of the main door and saw about 30 feet distant therefrom a partition running parallel with the front of the build-

ing. They could not see beyond this partition. Against this partition they saw a large pile of cartons. They also saw large tire tracks running from the front door, towards the partition and disappearing under the cartons. (Tr. 95.) They did not see anything that indicated that there was anybody there. (Tr. 96.)

Investigator Goggin opened the main door and all three investigators entered the premises. The interior of the building may be described as follows: The front part of the building between said partition and the main door was divided by another partition, making two rooms. The room leading from the main door and through which the investigators entered was the larger of the two rooms. This room was on the right hand side as you face the building. There was a door leading from this room to the other room on the left. In the latter room there was a door leading to the rear of the premises and to the still room. It was through these doors that the investigators travelled when they found the still, mash, and a quantity of alcohol and whiskey. (Tr. 99.) There was a man in the still room at the time and he gave the name of Frank Ferrari. He was arrested, questioned and searched. They found on his person a key which fitted the small door at the extreme right of the building. (U. S. Exhibit 4.)

About six p. m. one Silvio Cappi entered the premises through said front door. He was arrested, questioned and searched. They found on his person a key which fitted said front door. (U. S. Exhibit

5.) About 6:30 or 7 p. m. Investigators Goggin and DeKalb left the premises with Ferrari and Cappi. Investigator Burt remained in the still room to retain custody over the seizure. (Tr. 103.) About 8:10 p. m. Antonio Rocchia entered said premises through the small door and was immediately placed under arrest and searched. (Tr. 138.) There was found on Rocchia's person a wallet with a number of papers, a quantity of currency, a small purse with some currency in it and a number of various papers and a key which fitted the front door. Investigator Burt segregated the papers (U. S. Exhibits 7, 8 and 11) and returned to Rocchia the wallet and the small purse. (Tr. 140.)

About 10 p. m. Investigators DeKalb and Goggin returned to said still premises and saw defendant Antonio Rocchia in custody of Investigator Burt. (Tr. 144.) Investigator Goggin as he came into the room walked over in front of the defendant Rocchia, who was sitting on a yeast box and stopped in front of him and looked down and said, "Well, John (Investigator Burt), it looks like you have the Big Shot", and Burt replied, "Yes, it looks like I have, search him and see what you think." (Tr. 145.) The evidence was incompetent and improper and should not have been received as an admission. The statement was admitted over the objection of the defendant (Tr. 144, 5) to show what the defendant did under the circumstances. It was a statement not directed to him and was of such a nature as not to call for a reply. Shortly thereafter the investigators left with Rocchia

and took him to their office and fingerprinted him. (U. S. Exhibit 3.)

During the course of the trial the Government showed that a certain lease covering the property in question was executed by Axel L. Thulin, as lessor, and Joseph Rossi, as lessee. (U. S. Exhibit 13.) In attempting to prove that the signature "Joseph Rossi" was written by defendant Antonio Rocchia, the Government offered in evidence as exemplars the bond signed by defendant for his appearance in court in the case at bar (U. S. Exhibit 12), a finger-print card dated January 9, 1933, and signed "John Caruso" and applying to the case at bar (U. S. Exhibit 3) and a finger-print card dated October 11, 1930, signed "Antonio Rocchia" (U. S. Exhibit 14) and which had no connection with the case at bar. Objection to the receipt in evidence of said U. S. Exhibit 14 was duly made and exception noted. (Tr. 162, 167.) The writing "Antonio Rocchia" thereon was not proved by any witness to be that of the defendant and before it could be used as an exemplar in connection with the lease the handwriting expert was required first to establish its identity.

The Government also used as an exemplar a sheet of paper with a list of words and figures in two columns. (Tr. 161.) This paper was taken from the person of the defendant when he was searched by Investigator Burt (Tr. 140), and is a part of U. S. Exhibit 7. Said sheet of paper was partly written in Italian and translation thereof (U. S. Exhibit 11) over defendant's objection, was received in evidence.

(Tr. 157, 158.) Professor Edward O. Heinrich, the handwriting expert, appearing as a witness for the Government, stated that said sheet of paper was handed to him as an exhibit but was told that it might be Antonio Rocchia's handwriting. It was given with the reservation that it had not been identified. (Tr. 165.) From the signatures on the other undisputed exemplars, to-wit, said appearance bond and finger-print card dated January 9, 1933 (U. S. Exhibit 3), Professor Heinrich identified it as being in Rocchia's handwriting and then used said writing on said sheet of paper (U. S. Exhibit 7) to some extent as an exemplar together with finger-print card dated October 11, 1930 (U. S. Exhibit 14), in attempting to arrive at an opinion as to the authorship of the disputed writing on said lease. (Tr. 164-167 U. S. Exhibit 13.)

Mr. Sam McKee, a real estate agent, testified on behalf of the Government and he said that his office negotiated for the lease of said premises. He said he did not know the defendant and had never seen him before. That said defendant Antonio Rocchia was not the man who was introduced to him prior to the time the lease was signed and when the lease was being negotiated. (Tr. 146-7.)

The District Attorney improperly used said fingerprint card dated October 11, 1930, signed "Antonio Rocchia" and referring to an offense which had no connection with the case at bar. There was no necessity for the Government using said fingerprint card nor said sheet of paper. (U. S. Exhibit 7.) There

were other available genuine signatures of the defendant which could have been used, as will hereinafter appear in the argument, instead of bringing before the jury evidence having no bearing on the case and highly prejudicial to the defendant. (Tr. 160-167.) Said fingerprint card had nothing to do with the case at bar. It was taken long ago in connection with another arrest. This card contained a statement of the arrest. It showed no disposition of the offense. The defendant contends that the use of said fingerprint card was to get into the record indirectly said prior criminal record. It was prejudicial to him and a complete discussion of this error appears in the fourth ground for reversal as set forth herein.

In attempting to show the defendant's connection with the still, the United States Attorney offered in evidence photostatic copies of certain papers taken from the person of the defendant. (U. S. Exhibits 7 and 8.) In opposition to such offer, the defendant offered in evidence a certain order for the return of personal property and signed by Frank H. Kerrigan, United States District Judge in relation to the matter in controversy and filed on January 30, 1933 (Defendant's Exhibit 1 for identification Tr. 113), long before the indictment was returned which was on November 14, 1933. (Tr. 106-127, 141-144.) The trial judge permitted collateral evidence to be received in relation to said order. The United States Commissioner testified in respect thereto. (Tr. 151.) The said order of Frank H. Kerrigan had never been amended or set aside. It was binding on the trial

judge and the evidence in controversy (U. S. Exhibits 7 and 8) should never have been received. The defendant contends that the trial court erred in receiving in evidence said Exhibits 7 and 8 and the collateral inquiry in connection with said order of Frank H. Kerrigan. Said order was in full force and effect, had never been set aside or amended and could not be set aside by another judge of the same court. A discussion of this error appears in the second ground for reversal as set forth herein.

As part of said Exhibit 8 is a certain note or memorandum addressed to no one but signed by H. Von Husen, Inspector, San Francisco Water Department, which reads as follows:

> "I have shut off your water at valve in water box. Meter running wide open. Pipe must be broken inside as water bill for month of Dec. will be over $75.00. Would advise getting plumber and call at office 425 Mason Street.
>
> Von Husen, Inspector, S. F. Water Department 1/4/33 1:30 p. m."
>
> (Tr. 150.)

This note was identified by said H. Von Husen, who stated that he had put it under the small door of 60 Brady Street. It was not shown that the defendant ever answered or acted upon it. It was prejudicial to the defendant and should not have been received. Defendant claims error in connection with said note in that it was not shown by the government that the defendant either answered or acted upon it. A discussion of this error appears in the third ground for reversal as set forth herein.

During the course of the trial the United States Attorney while offering testimony in connection with said photostatic copies of papers taken from the person of the defendant at the time of his arrest (U. S. Exhibits 7 and 8) stated in answer to an objection by the defendant (Tr. 118-122) that "if the defendant desires to produce them we will be glad to use them". When defendant objected to this statement the court replied that "He (U. S. Attorney) can demand any documents proper to be introduced by you (defendant)." The defendant assigned the remarks of the United States Attorney and the court as misconduct and in each instance requested the court to instruct the jury to disregard them which was refused. Since these errors occurred at the same time they are argued together in the fifth ground for reversal as set forth herein.

ASSIGNMENTS OF ERROR.

Numerous assignments of error were taken to the testimony of witnesses and to the introduction of evidence at the trial. They may be summarized as follows:

(1) Search and seizure were unreasonable and in violation of defendant's constitutional rights under the Fourth and Fifth Amendments to the United States Constitution.

(2) Error of court in admission of papers taken from the person of defendant at the time of his arrest (U. S. Exhibits 7 and 8) and excepted to by him.

(3) Error of court in admission of note or memorandum written by H. Von Husen, Inspector, S. F. Water Department. (Part of U. S. Exhibit 8.)

(4) Error of court in admission of translation of certain sheet of paper containing two columns of writing and is part of U. S. Exhibit 7. (Translation is U. S. Exhibit 11.)

(5) Error of court in admission of fingerprint card dated October 11, 1930, signed Antonio Rocchia (U. S. Exhibit 14) and having no relation to the case at bar.

(6) Misconduct of United States Attorney in effect calling on defendant to produce original papers in relation to photostatic copies then before the trial court.

(7) Error of court in refusing to instruct the jury to then and there disregard the demand made by the United States Attorney for said original papers.

(8) Misconduct of trial court in saying in connection with said demand of said United States Attorney that said United States Attorney can demand any documents proper to be introduced by the defendant.

(9) Error of court in refusing then and there to instruct the jury to disregard the said remarks of said trial court.

(10) Error of court in admission of statements made by and between investigators Burt and Goggin in presence of defendant.

(11) Error of court in refusing admission on behalf of defendant of petition for exclusion of evidence and return of property before the United States Commissioner and order for return of personal property signed by Frank H. Kerrigan, United States District Judge. (Defendant's Exhibit 1 for identification Tr. 110, 114.)

In the argument herein presented we will, however, for the sake of brevity, endeavor to consider as many of these assignments collectively as may be possible under the circumstances.

ARGUMENT.

I.

FIRST GROUND FOR REVERSAL.

SEARCH AND SEIZURE WERE UNREASONABLE AND IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(Assignments of Error 1, 2, 3, 4, 5, 6, 7, 11, 12, 14, 15, 16, 17, 18, 19, 28, 29, 30, 32, 39; Tr. 16-22, 25-52, 60-65.)

On November 14, 1933, the Grand Jury of the United States in and for the Northern District of California returned an indictment against Antonio Rocchia, Frank Ferrari and Silvio Cappi charging them with violating certain provisions of the Internal Revenue Act and with conspiracy to so violate said Act. (Tr. 2.)

On December 23, 1933, said defendant Antonio Rocchia filed a verified motion to suppress evidence upon the ground that the search and seizure at the time of the arrest of said defendant Antonio Rocchia was in violation of his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States. (Tr. 79.)

On January 6, 1934, at the hearing on said motion to suppress, the following proceedings were had:

> "John M. Burt, called for the United States, being duly sworn, testified as follows: Direct examination. I am an investigator in the Bureau of Investigation, Department of Justice, and I was such on January 9, 1933, and prior thereto. On or about January 9, 1933, I made an investigation of the premises known as 60 Brady Street. On that day investigator Goggin told me in the presence of investigator De Kalb that he had gotten information that a distillery was in operation at said premises. At 4:30 P. M. on that day the three of us proceeded to the vicinity of that address and observed a strong odor of fermenting mash and distillation in the vicinity; that odor was traced to 60 Brady Street.
>
> The Court: When you say 'traced' you mean you approached the premises and determined to your satisfaction the odor came from them?
>
> A. Yes. Standing at the door of No. 60 Brady Street, I could hear the roar of a gas burner and the hum of motors inside, and then observed the odor of distillation.
>
> Q. Where were you standing when you heard the hum of the motors?
>
> A. On the sidewalk in front of 60 Brady Street. Investigator Goggin slid back the front door,

which was not fastened. Before doing so we had observed the odor of fermenting mash, and there was a sign up over one of the doors indicating that a drayage company was operating in there. We looked in through the glass and saw no drays——

Q. How near the sidewalk was that?

A. We were on the sidewalk at the time.

Q. How far away did you look through?

A. This was right on the sidewalk. We could see in about 20 or 25 feet back from the front what appeared to be a newly erected partition and through one small aperture at the top of that partition I saw a light coming through and I saw what appeared to be the top of a large door that had been cut in the partition, but was concealed all but about six inches by a large pile of pasteboard cartons. There were truck tracks running back along that pile of cartons apparently through that doorway. Investigator Goggin then slid back this door, which was not fastened, and we entered the building.

Q. Just stop there for a minute. You had smelled what you thought was fermenting mash?

A. Yes.

Q. You had heard the hum of motors?

A. Yes.

Q. Had you heard any sound indicating anybody was present on the premises?

A. No.

Q. Proceed.

A. In this partition there was another small door which Investigator Goggin opened, it being unfastened, and we entered the rear part of the premises. We there saw a man standing by an alcohol receiving tank drawing alcohol into a five-

> gallon can, and a large alcohol distillery in full operation, full of mash and sacks of sugar. He was placed under arrest." (Tr. 80-82.)

On February 2, 1934, and prior to the ruling by said trial court on said motion to suppress, said defendant Antonio Rocchia filed a verified amended motion to suppress upon the same grounds as in the original motion. (Tr. 88.)

That after hearing and consideration of said motion to suppress as amended the same was denied and exception noted. (Tr. 88.) During the trial and upon the presentation of evidence of said search and seizure said defendant Antonio Rocchia renewed said motion to suppress and objected to admission of evidence thereof which were denied by said court and exceptions taken to the rulings thereon. (Tr. 95, 96.) At that time said defendant suggested to said trial court that the said objections so made follow throughout this particular line of testimony. The trial court stated that it was necessary to make the objection each time that it was wanted in the record. (Tr. 97.)

At the outset it is well to bear in mind that the Constitution is to be liberally construed.

In *Gouled v. U. S.,* 255 U. S., 298 at 304, it was held:

> "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

See also

Grau v. U. S., 287 U. S., 124 at 128;
Boyd v. U. S., 116 U. S., 616 at 635.

Furthermore it is a duty of the court to protect the constitutional rights of persons against encroachments thereon. In this connection see *Boyd v. U. S.,* 116 U. S., 616 at 635:

> "This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.*"

See also

U. S. v. Lefkowitz, 285 U. S. 452 at 464, Par. 3.

The foregoing authorities mean that if there is any question as to the validity of a search determining weight should be given to the broad consideration of the constitutional right intended to be saved and perpetuated by the Fourth and Fifth Amendments.

In this respect District Judge Thomas in *U. S. v. DiCorva,* 37 Fed. (2d) 124, said:

> *"I admit that the question is by no means free from doubt, but my conclusion is that, in the matter of doubt, it is better to uphold the Constitutional immunities than to be keen to discover a basis for circumventing them.*

I think the language of the Supreme Court in Byars, Petitioner, v. United States, 273 U. S. 28, 47 S. Ct. 248, 250, 71 L. Ed. 520 decided on January 3, 1927, embodies the spirit which should guide federal courts in judging in any doubtful case involving the application of the Bill of Rights. The court there said: 'The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.'

Or, as Justice Bradley said in Boyd v. United States, 116 U. S. 616, at page 635, 6 S. Ct. 524, 535, 29 L. Ed. 746: 'It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.'

In the Byars case we have about the last word from the Supreme Court on the merits of the controversy at bar. It is instructive to note that on page 29 of 273 U. S., 47 S. Ct. 248, 71 L. Ed. 520, Justice Sutherland said: 'A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed'."

It is well to note from the above that in *U. S. v. DiCorva,* supra, it was held that if there is doubt as to the reasonableness of the search and seizure it is best to uphold the constitutional guarantees and therefore it should be resolved in favor of the defendant. It has long been established that the constitutional protection extends beyond the home and protects the places of business, factories or other houses of the defendant. *In re Phoenix Cereal Bev. Co.,* 58 Fed. (2d) 953 at 956, the court said:

> "Constitutional protection extends beyond the home and this plant is protected against unlawful searches and seizures as is any other business place."
>
> *Gouled v. U. S.,* 255 U. S. 298 at 309;
> *U. S. v. Lefkowitz,* 285 U. S. 452 at 464.

The facts set out above for convenience may be briefly summarized as follows: That the investigators having had information that a still was operated at 60 Brady Street they went near the premises indicated, smelled odors of fermenting mash and distillation and heard burners and the hum of motors. Through the windows they saw many cardboard cases and entered through a door.

Under these facts the investigators claim the right to enter without a search warrant. They did not see nor hear anyone in the premises. There was no offense being committed in their presence nor did they have probable cause to believe that a felony was being committed.

The investigators went to the place with information that a distillery was being operated on the premises. This was pure hearsay. As the investigators were near the premises they smelled the odor of fermenting mash and distillation. This alone was not knowledge that there was a still in the premises. They also heard the roar of burners and motors. They assumed from this that a still was in operation in said premises.

Probable cause must be based on facts. In *Wagner v. U. S.,* 8 Fed. (2) 581 at 583 C. C. A. 8, Paragraphs 1, 2, it was held:

> "The evidence before the judge or commissioner who issues the search warrant must be such as would be admissible on trial. Giles v. U. S. (C. C. A.) 284 F. 208, 214. The commissioner must be furnished with facts—not suspicions, beliefs, or surmises. Veeder v. U. S., 252 F. 414, 164 C. C. A. 338. A mere conclusion is insufficient either in the affidavit or the complaint. U. S. v. Kaplan (D. C.) 286 Fed. 963, 969."

See also *Grau v. U. S.,* 287 U. S. 124 at 128, Third Paragraph.

Since it is necessary to submit facts to the United States Commissioner to support a search warrant the investigators upon making a search and seizure without a warrant must likewise have facts before entering the premises and not mere suspicions, beliefs, or surmises.

Probable cause must not be based upon suspicion. *Brown v. U. S.,* 4 Fed. (2d) 246 C. C. A. 9, Paragraph 2.

Likewise an assumption must not be based on an assumption to supply elements to support probable cause. In *Ranelli v. U. S.* 34 F. (2d) 877 at 880 C. C. A. 8, it was held:

> "There is a second reason why the prohibition agent did not have knowledge through his sense of smell that the crime in question was being committed in his presence. Let it be granted for the sake of argument that the sense of smell gave the prohibition agent knowledge that there was fermenting mash in the house. This was not knowledge that there was a still in the house; much less that the still was unregistered. There was no evidence to show, and it is not claimed, that the smell of fermenting mash from an unregistered still is any different from the smell of fermenting mash from a registered still, from an ordinary cauldron, or from a kitchen stewpan.
>
> The truth of the whole matter seems to be that the prohibition agent detected a smell coming from the residence, which he assumed or inferred was the smell of fermenting mash; he assumed further that some person was in the house in possession of a still containing the mash; he assumed further that the still was unregistered. *This series of assumptions would not be admissible evidence in court to prove that a crime was being committed; neither did it constitute knowledge in any true sense of the word on the part of the prohibition agent that the crime for which defendant was afterward indicted was being committed in his presence.*"

The investigators, prior to entering said premises in the case at bar, could not say that there was a still in

operation nor could they say that anyone was in the building. They simply assumed from the smell of the mash that there was then and there mash upon the premises; they assumed from the roar of the burner and the noise of the motors that a still was being operated. From the assumption of the presence of mash on the premises and from the assumption from the roar of the burners and the noise of the motors that a still was in operation the investigators further assumed that there was someone on the premises. It is submitted that this series of assumptions is not sufficient to support probable cause to believe that a crime was being committed.

The controlling case on the subject of searches and seizures is that of *Taylor v. U. S.,* 286 U. S. 1, decided by the Supreme Court on May 3, 1932, where the facts are peculiarly like those in the instant case. As stated by Justice McReynolds, the facts of that case were as follows:

> "During the night, November 19th, 1930, a squad (six or more) of prohibition agents, while returning to Baltimore City, discussed premises 5100 Curtis Avenue, of which there had been complaints 'over a period of about a year'. Having decided to investigate, they went at once to the garage at that address, arriving there about 2:30 a. m. * * *
>
> As the agents approached the garage they got the odor of whiskey coming from within. Aided by a searchlight, they looked through a small opening and saw many cardboard cases which they thought probably contained jars of liquor. There-

upon they broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise." (286 U. S. at p. 5.)

The court held that the search violated the constitutional rights of the defendants and reversed the conviction which had theretofore been had, saying:

> "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.
>
> We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed." (286 U. S. at p. 6.)

This decision was an affirmation by the Supreme Court of the rule laid down in this circuit beginning with *Temperani v. U. S.*, 299 F. 366. In that case, the facts, as stated by Judge Rudkin, were as follows:

> "Some time prior to December 1, 1922, certain federal prohibition agents were informed that intoxicating liquor was manufactured in the garage beneath the dwelling. On the above date the officers visited the premises, and detected the

odor arising from the manufacture of intoxicating liquor emanating from the garage. They thereupon forced an entry and discovered stills in operation, a quantity of intoxicating liquor, and a quantity of mash used in the manufacture thereof. At the time of the entry there was no person in the garage, and the plaintiff in error was absent from home."

Our Circuit Court held the search bad, and at page 367 said:

"The government, as we understand it, does not claim the right to search a private dwelling or garage under the facts disclosed by this record, but an attempt is made to justify the conduct of the officers under the common-law or statutory rule permitting peace officers to make arrests for offenses committed within their presence. But here the offender was not in the presence of the officers; he was not in the garage, and they had no reason to suspect that he was there. *Laying all pretense aside, the officers entered the garage, not to apprehend an offender for committing an offense within their presence, but to make a search of the premises to obtain tangible evidence to go before a jury, and whatever necessity may exist for enforcing the National Prohibition Act,* (Comp. St. Ann. Supp. 1923, sec. 10138¼ et seq.) *or other laws, the violation of rights guaranteed by the Constitution cannot be tolerated or condoned. If present laws are deficient in not permitting the search, in a constitutional way, of homes where intoxicating liquor is known to be manufactured, the remedy is with Congress, not in subterfuge or evasion.* For these reasons, the

> court should have kept from the jury all property found on the search and all evidence given by the officers concerning the same." (Italics ours.)

The *Temperani* case was cited with approval by the Circuit Court of the United States in the case of *Agnello v.* United States, 269 U. S. 20 at 33.

In this circuit on February 8, 1932, an opinion was rendered in *Donahue v. United States,* 56 F. (2) 94 at 95, wherein the question of the reasonableness of a search and seizure was discussed. The facts showed that the agents received information that Donahue intended to make second run of liquor at his ranch on the next day which was Sunday. The next day the agents went there. As they approached the house they got the smell of liquor and heard the still in operation. They entered the house and found the defendant. That case is distinguished from the case at bar in the following particulars: The premises before us consisted of a large concrete building, which had a sign on the front thereof indicating there was some kind of a drayage business conducted therein. (Tr. 95.) In other words, the building presented the appearance of some commercial industry. The record does not show that this building was off by itself but we may assume that being commercial that there were buildings similar in type to it and adjacent thereto. In the building in question there were paper cartons. The noise of the burners and hum of motors may reasonably have been from the operation of a legitimate business and the containers therein used in connection therewith.

The agents said they traced the odor of fermenting mash and distillation to this building. The agents did not make any special investigation such as going on the adjoining property to determine the source thereof, and to be sure that it did not come from some other building. (Tr. 87.)

The odor of mash permeates the atmosphere and spreads out generally so that it becomes extremely difficult to say with precision that it is coming from a certain spot. The only reasonable way to determine its source is by investigation. It is different, of course, in a case like *Donahue v. United States,* where the building is in an open space such as a farm and is by itself. In such a case it may reasonably be traced to the farm house. In the case at bar the agents by failure to complete their investigation could not with reasonable certainty say that the odor of mash and distillation came from within. Nor is that all. In *Donahue v. United States* (supra) the search and seizure were made on Sunday. In the case at bar the search began January 9, 1933, about 4:30 p. m., which was *Monday.* (Tr. 99.) This was during business hours. The noise the agents heard could have come from the operation of a legitimate business. Again the agents failed to investigate and determine the real nature of the noises. They were content to make a cursory observation from the sidewalk. (Tr. 81.)

What may be sufficient probable cause to search a ranch house on Sunday, a day of rest, may be greatly insufficient in the search of city commercial property on a day when business generally is carried

on. Each case must stand or fall on its own facts. In the case at bar the investigators simply drew hurried conclusions without properly verifying the surrounding facts and their search was without reasonable or probable cause. It was circumstances like these that the court had reference to in *United States v. Lefkowitz,* 285 U. S. 452 at 464, where it was said:

> "Indeed, the informed and deliberate determination of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

See also *Taylor v. U. S.,* 286 U. S. at pages 5 and 6, where it was said:

> "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity to do so and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.
>
> "We think, in any view, the action of the agents was inexcusable and the seizure unreason-

able. The evidence was obtained unlawfully and should have been suppressed."

It will be well to note in passing that *Taylor v. United States,* (supra), was decided shortly after *Donahue v. United States,* (supra).

A case similar to the instant case is that of *United States v. Hirsch,* 57 F. (2) 555. In that case, prohibition agents, over a period of several days got the odor of fermenting mash from a brewery which had its doors and windows shuttered up and barred up. Also, one of the agents put his ear to a crack in the wall of the building when he heard what appeared to be running machinery. The question, as stated by the court, was as follows: Did the condition and circumstances as testified to by the prohibition agents who testified to perceiving the smell of fermenting mash when they got close to the building, justify the assumption that a crime was being committed in the presence of the officers? The court held that it was not sufficient and granted the motion to suppress, saying:

> "Can it be said that the odor of distilling mash in the vicinity of a closed building together with some smoke coming from the chimney of the building and some sound which might have come from machinery within the building is sufficient to justify the conclusion that an illicit still was being operated within the building?
>
> The cases of Raniele v. U. S., 34 F. (2d) 877 (C. C. A. 8th) and De Pater v. U. S., 34 F. (2d) 275, 74 A. L. R. 1413 (C. C. A. 4th), are authority

for the proposition that such evidence as has been adduced here is not sufficient to authorize the search of premises without a search warrant. These are cases in which a private house was searched, but the language of the court in discussing the principle is broad enough to cover other than residences. Other cases in which it has been held that the sense of smell is not sufficient evidence to warrant a search are: Temperani v. U. S. (C. C. A. 9th) 299 F. 365; Bell v. U. S. (C. C. A. 9th) 9 F. (2d) 124; Schroeder v. U. S. (C. C. A. 9th) 14 F. (2d) 500; Staker v. U. S. (C. C. A. 6th) 5 F. (2d) 312; Day v. U. S. (C. C. A. 8th) 37 Fed. (2d) 80; U. S. v. Dean (D. C. Mass.) 50 F. (2d) 906; U. S. v. Tachino, Number 5858 Criminal, oral opinion by Judge Woodrough (D. C. Nebraska).

A reading of the cases leads to the conclusion that the tendency of the courts is to hold that sense of smell must be supported by other concrete facts, and circumstances surrounding the situation to justify the conclusion that the crime is being committed. * * *

To hold in this case that the search was legal would be practically to hold that the officers could enter any building if they testified that they smelled fermenting mash coming from it, or if they smelled about the building any other odor that is frequently present in the making or possession of intoxicating liquors. I agree with most of the others judges who have written on this subject that the olfactory organs of the average prohibition agent are not sufficiently trained and accurate to be relied upon by the courts without

supporting evidence from the other senses. Professor Wigmore, in Principles of Judicial Proof (2d Ed.) Secs. 172, 173, comments on the unreliability of the sense of smell as evidence, and after giving some illustrations states this conclusion: 'Statements by witnesses concerning perceptions of odor are valueless unless otherwise confirmed.' * * *

I am conscious that in this case, as in many others of this nature that we have to pass upon, the event justified the suspicions of the prohibitions agents. It may be that such evidence as they had gathered was sufficient for them to have obtained a search warrant on probable cause. Quandt Brewing Co. v. U. S., 47 F. (2d) (C. C. A. 2nd). In any event, by putting a watch on the place they would certainly have learned things about its use and occupation that would have adequately bolstered up their sense of smell. My conclusion is that on the evidence as it is presented in this case the agents were not justified as a matter of law in breaking into these premises on the theory that a crime was being committed in their presence."

Furthermore, in the orderly procedure of investigation the facts then and there procured should have been submitted to the United States Commissioner in support of an application for a search warrant. They went to said premises and searched for the still. They took it upon themselves to enter. As part of the series of Internal Revenue Acts under which the indictment was returned and to be considered with them

is *Section 3462 R. S.*, providing for issuance of search warrants when a fraud on the revenue has been or is being committed and provides as follows:

> "The several judges of the circuit and district courts of the United States, and commissioners of the circuit courts, may, within their respective jurisdictions, issue a search-warrant, authorizing any internal revenue officers to search any premises within the same, if such officer makes oath in writing, that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises."

The Internal Revenue Laws are subject to the constitutional limitations. (*United States v. Swan,* 15 Fed. (2) 598 at 599; *Wagner v. United States,* 8 Fed. (2) 581 at 584 C. C. A. 8th.) This section lays down the orderly manner in which agents may lawfully enter premises. There was no necessity for brushing this procedure aside. The investigators saw no one. There was no probability of an immediate change in the premises or of those who might be connected with it. Under the circumstances they should have procured a search warrant. See *Taylor v. United States,* 286 U. S. at pages 5 and 6, supra.

Enactment by Congress of Section 3462 R. S. was not an idle act nor is the Supreme Court's opinion to be taken as just mere words. They were made to preserve the constitutional guarantees and to prevent encroachment thereon. In this connection see *U. S. v. Lefkowitz,* 285 U. S. 452, at 464, supra.

In *U. S. v. DiCorvà*, 37 Fed. (2) 124, at page 132, the court stated as follows:

> "It is safer to require a strict compliance with the law that search warrants be procured than to permit prohibition agents to become a law unto themselves and improperly act without a search warrant. The machinery is provided for the use of the prohibition agents, and in such a case as this record presents it appears that here was an instance where the agents not only could have secured a warrant, but should have done so before making the arrest and seizure."

It will be seen from the above that prior to entering said premises by said investigators they observed no offense being committed in their presence nor did they have probable cause to believe that a felony was being committed therein. The search and seizure therefore were unreasonable and the motion to suppress should have been granted on behalf of said defendant.

II.

SECOND GROUND FOR REVERSAL.

ERROR OF COURT IN ADMISSION OF PHOTOSTATIC COPIES OF PAPERS TAKEN FROM THE PERSON OF DEFENDANT AT THE TIME OF HIS ARREST.

(Assignments of Error 11, 12, 14, 23, 27, 35, 41; Tr. 25-30, 44, 55, 58, 66, 72.)

In this connection the facts may be briefly stated as follows:

On January 9, 1933, while Investigator Burt was alone in said still premises, the defendant Antonio Rocchia entered and was immediately placed under arrest and searched. Burt found a wallet with a number of papers and a quantity of currency and a small purse also with currency in it, together with some bills rolled in his pocket. Investigator Burt kept the papers and returned the wallet and small purse and money to Rocchia. (Tr. 140.) At the trial there was shown to the agents as witnesses on behalf of the government, over objection of defendant, photostatic copies of the papers taken from the person of the defendant. (U. S. Exhibits 7 and 8, Tr. 106, 123, 141.)

In support of said objection said defendant offered in evidence the order for return of personal property signed by Frank H. Kerrigan, United States District Judge, together with petition for exclusion of evidence and return of property before United States Commissioner Ernest E. Williams in connection with the evidence which is the subject of this prosecution. The offer was denied and exception noted. (Tr. 106, Defendant's Exhibit 1 for identification.)

The said photostatic copies were later received in evidence. (U. S. Exhibits 7 and 8, Tr. 143.) They may be described as follows:

Exhibit 7 comprises: (1) Cash receipt dated January 9, 1933, for a certain number of sacks of cane sugar, argo and cans, totaling $280; (2) one sheet of paper with numbers and dates thereon; (3) one sheet of paper containing the words "zucchero" and "yeast" and certain sums besides each item, together with other words thereon, apparently written in Italian. (See translation, U. S. Exhibit 11, Tr. 158.)

Exhibit 8 comprises: (1) Automobile operator's license of Antonio Rocchia; (2) two receipts for foreign money orders for 500 lire each, showing purchase by Antonio Rocchia on December 5, 1932; (3) Duplicate deposit slips of Antonio Rocchia with American Trust Company; (4) a card containing the name Joseph Daneri and telephone number; (5) letter of H. Von Husen, inspector, S. F. Water Department, dated January 4, 1933, relative to use of water; (6) insurance policy holder's identification card.

The United States Attorney in order to collaterally attack said order for return of personal property signed by Frank H. Kerrigan, United States District Judge (Tr. 113), called the United States Commissioner Ernest E. Williams to testify to the record of the proceedings before him on January 25, 1933, on the preliminary hearing of said offense, the subject of this trial. Commissioner Williams testified as follows:

"There was a hearing on this complaint. I am of the opinion that there was a motion to suppress filed before me. I have not the papers. They are in the clerk's office. I would have to have the file to be able to say that there was a Motion to Suppress filed on behalf of the defendants in this case, particularly the defendant Caruso. I am of the opinion that there was. I have nothing in my docket to show it. My records show what the disposition of the case was by me; on January 28, 1932, I held the defendant Ferrari and I dismissed the other defendants, towit, Cappi and Caruso (Rocchia).

I have in my docket that Mr. Abrams, who represented the Government at that time, consented to the dismissal of Caruso and Cappi. I have forgotten whether I decided a motion to suppress, but I would assume that I dismissed it upon the suggestion of Mr. Abrams, or, rather, dismissed them. I cannot say there was no motion to suppress presented to me. I have forgotten about that. I would say they were dismissed because Mr. Abrams moved to dismiss. I follow the policy of the United States Attorney, that is, if he suggests a dismissal I accept the suggestion. I would say there was no ruling by me on any motion to suppress so far as the defendant Caruso is concerned. I do not feel certain of my statement when I say that was my course of conduct in that case because I have had so many cases; I merely have in my docket that Abrams consented to the dismissal of Cappi and Caruso, which would indicate to me clearly that is the reason I dismissed them. I recollect signing an affidavit in which I set forth that I had not

passed upon that matter. I signed a document entitled 'Affidavit of Ernest E. Williams, United States Commissioner,' Filed February 1, 1934, with the Clerk's office. I have read the affidavit and it is correct. The affidavit is to the effect that the motions to suppress were presented but no ruling was had upon them, at all.

This affidavit was sworn to by me on January 6, 1934. I don't know when the petition to suppress was filed. (Defendant's Exhibit No. 1 for identification.) I have no record of that in my docket. I have no place there for such notation. The arrest took place on January 9, 1933, and the transcript of testimony taken on January 25, 1933, was taken before me as United States Commissioner. The matter was presented before me on January 25, 1933, and the ruling was made on January 28, 1933."

(Tr. 152-154.)

The defendant at the conclusion of said Commissioner's testimony again offered in evidence said motion to exclude and return property and order for return of personal property (Defendant's Exhibit 1 for identification) which was refused and exception noted. (Tr. 155.)

For convenience, the orders of the court admitting in evidence said photostatic copies (U. S. Exhibits 7 and 8) and refusal to receive in evidence, on behalf of defendant, said petition for exclusion of evidence and return of property filed before said United States Commissioner and said order for the return of personal property (Defendant's Exhibit 1 for identification) may be considered together.

Where the search and seizure was held unreasonable and papers taken in connection with such search were ordered returned, it was error to use photostatic copies thereof in evidence upon the trial. In this connection, in *Silverthorne Lumber Co. v. U. S.,* 251 U. S. 385 at 390, 391 and 392, it was held:

> "The facts are simple. An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, 1919, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshal without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there. All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books etc., were taken at once. An application was made as soon as might be to the District Court for a return of what thus had been taken unlawfully. It was opposed by the District Attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury. Color had been given by the District Attorney to the approach of those concerned in the act by an invalid subpoena for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance. Photographs and copies of

material papers were made and a new indictment was framed based upon the knowledge thus obtained. The District Court ordered a return of the originals but impounded the photographs and copies. Subpoenas to produce the originals then were served and on the refusal of the plaintiffs in error to produce them the Court made an order that the subpoenas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights. The refusal to obey this order is the contempt alleged. The Government now, while in form repudidating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. U. S., 232 U. S. 383, to be sure, had established that laying the papers directly before the Grand Jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not*

> *merely evidence so acquired shall not be used before the Court but that it shall not be used at all."*

To permit the use of papers in evidence when the search and seizure were held unreasonable is equivalent to compelling the defendant to be a witness against himself.

In *Gouled v. U. S.*, 255 U. S. 298 at 306 it was held:

> "The second question reads:
>
> 'Is the admission of such paper in evidence against the same person when indicted for crime a violation of the 5th amendment?'
>
> Upon authority of the Boyd Case, supra, this second question must also be answered in the affirmative. In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

It will be noted that on January 25, 1933, the hearing was had before the United States Commissioner and on January 30, 1933, said order of Frank H. Kerrigan for return of personal property was filed. Said order is still in full force and effect. It has never been amended or set aside. Said order therefore was and is binding on the trial court. To permit a collateral inquiry of said order and allow evidence to be received in contravention thereof was

equivalent to decreeing that said Judge Frank H. Kerrigan's order was of no binding force and effect. This the trial court had no right to do. In *Hardy v. North Butte Mining Co.*, 22 F. (2d) 62 (C. C. A. 9), the facts showed that in the United States District Court for the District of Montana upon complaint filed praying, among other things, for appointment of two ancillary receivers and answer thereto consenting to such appointment the court appointed two receivers. Later the receivers presented a report and petitioned the court for an order confirming certain acts as such receivers. The court was presided over by a different judge, who made an order on its own motion requiring the parties to show cause why the order theretofore made appointing the receivers should not be vacated, on the ground that it was mistakenly and improvidently made, and why the receivership should not end and the suit be dismissed. On the return to the order to show cause, the court made a final order discharging the receivers and dismissing the suit. This appeal was taken therefrom. As to the right of said judge to make said final order in a case previously presided over by another judge in the same court Judge Rudkin said at page 63 as follows:

> "The sole question presented for decision in this: If an order appointing receivers is made in a suit within the jurisdiction of the court making the order, and in the exercise of judicial discretion, may another judge sitting in the same court, on the same record, of his own motion or otherwise, vacate the order of appointment because, in his opinion, the order was mistakenly

or improvidently made. On both principle and authority this question must be answered in the negative.

* * * * * * *

In Plattner Implement Co. v. International Harvester Co., supra, Judge Sanborn said:

'But the rule itself, and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases. It is unavoidable that the opinions of several judges upon the many doubtful questions which are constantly arising should sometimes differ, and a rule of practice which would permit one judge to sustain a demurrer to a complaint, another of co-ordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment, upon the ground that his decision upon the demurrer was right, would be intolerable. It has long been almost universally observed.'

In Commercial Union of America v. Anglo-South American Bank, (C. C. A.) 10 F. (2d) 937, the court said:

'The situation presented, therefore, is this: That after one judge sitting in the case had decided the complaint to be sufficient, another judge sitting in the same court decided it was insufficient and dismissed it. We are not aware that it has ever before happened that in the Southern district of New York, or in any district within

this circuit, one judge has in effect undertaken to set aside or ignore an order made by another judge of co-ordinate jurisdiction in the same suit.'

And after a searching and painstaking review of the authorities, the court concluded:

'We have at some length set forth the rulings of the federal courts on the effect of a decision made by a trial judge upon the right of a judge sitting subsequently in the same court and in the same case to overrule the decision of the first judge on the same matter. We have done so because the question raised is important, and has to do with the dignified and orderly procedure of the courts, and is a departure from what has been regarded heretofore in this and in the other circuits as improper and not to be countenanced.'

If the original order appointing the receivers could be vacated and set aside by another judge sitting in the same court, on the ground that the order was made mistakenly and improvidently, it would seem to follow that the order vacating the appointment and dismissing the complaint could be set aside by another and different judge, sitting in the same court, on the same ground, and for the same reason, and we would then be confronted with the intolerable situation to which Judge Sanborn referred.

* * * * * * *

The decree of the court below, dismissing the complaint and discharging the receivers, must be reversed; and it is so ordered."

If this were not so then every order, even long after the time to correct or amend has passed, is not

free from attack. Such a situation cannot be countenanced.

It is well to note that said order for return of personal property was approved by the United States Attorney and filed five days after the hearing before the United States Commissioner. The United States Attorney was a party to the proceedings. He made no objection, in fact, he concurred. No steps were taken by the United States Attorney to amend or correct the order. It was not until the time of trial, to-wit, June 24, 1934, that the United States Attorney attempted to nullify said order. (Tr. 108.) Having been content to wait from January 30, 1933, to June 24, 1934, before even attempting to correct said order, he cannot now complain.

In *Mitchell v. Cunningham,* 8 F. (2d) 813 (C. C. A. 9), the facts disclosed:

On April 10, 1920, property in dispute belonged to Chas. Rury; on that day he executed conveyances to Mitchell. On December 9, 1920, Rury filed a voluntary petition in bankruptcy and was adjudged a bankrupt. Cunningham was appointed trustee. On January 12, 1921, Cunningham brought suit in Superior Court for Benton County to set aside conveyances. Mitchell answered and on November 1, 1922, decree entered setting aside deeds and conveying property to Cunningham. Mitchell later filed suit to quiet title to said property and Cunningham set up adjudication. Mitchell contended that the decree in the former suit should not have gone further than to charge the property with a lien in such sum as

would suffice to pay Rury's indebtedness at the date of the conveyances. In answer to this the court held:

> "In the former litigation, appellee alleged that he was the qualified and acting trustee in bankruptcy in the matter of the bankruptcy of Charles Rury; that with intent to defeat the claims of his creditors, on the 10th of April, 1920, Rury conveyed the property in dispute without consideration to appellant; that there were outstanding claims of creditors, proof of whose claims had been filed with the referee in bankruptcy; that the trustee had no funds or assets with which to pay these claims and the expenses of the bankruptcy proceeding. The complaint also alleged with particularity the bankruptcy proceeding and adjudication. Based on these allegations, appellee prayed that the deeds referred to be set aside, and that appellant be required to convey the properties to appellee to be administered in bankruptcy. In his answer appellant admitted some of these allegations, traversed others, and set up an affirmative defense. The decree followed the prayer of the complaint.
>
> Appellant had an opportunity to be heard as to all matters involved in the litigation, including the form of the decree. He cannot now be heard to say that the whole proceeding should be disregarded, because the decree gave larger relief than was warranted by the facts alleged and proved. The decree of a court of general jurisdiction, which is responsive to the prayer of plaintiff's initial pleading, and which has some reasonable support in the allegations thereof, cannot be treated as a nullity, where the defendant appears generally and is heard. The correct-

ness of the decree will not be inquired into on collateral attack." (at p. 815.)

It is apparent that the government was aware of the proceeding and form of the order and is therefore bound by it.

Assuming, only for the sake of argument, that the United States Attorney had the right to attack said order collaterally, in doing so the government must show *affirmatively* the grounds for such attack. In this connection in *Archer v. Heath,* 30 F. (2d) 932 (C. C. A. 9), it was held:

> "This is an appeal from an order discharging the appellee from the custody of the warden of the United States penitentiary at McNeil Island, Washington, to whose custody he had been committed in execution of a final judgment of the United States Court for China. The reason for the discharge was that the information upon which the conviction was had failed to charge that the appellee was a citizen of the United States at the time of the commission of the crime. * * *
>
> In considering the question thus presented we must bear in mind the nature of the attack on the judgment of conviction and the wide distinction between a direct and a collateral attack. Where a judgment of a United States court is attacked directly by appeal, the judgment will be reversed, unless the jurisdictional facts appear some place in the record; but on a collateral attack, such as by habeas corpus, the judgment is presumptively valid, unless it appears affirmatively from the record that the court was without jurisdiction." (At p. 933.)

In support of the United States Attorney's attempt to collaterally attack said order for return of personal property one and one half years after its issue, he called the United States Commissioner Ernest E. Williams, whose testimony may be summarized as follows: That the United States Commissioner was of the opinion that the motion to suppress was filed before him on behalf of said defendant; that there was nothing in his records showing that he dismissed the defendant and that Mr. Abrams, who represented the government at the time, consented to dismissal; that he had forgotten whether he had dismissed the motion to suppress; that there was no ruling by him on any motion to suppress so far as the defendant was concerned but that he did not feel certain of this statement because he had so many cases; that his docket merely showed that Abrams consented to dismissal of the defendant which indicated to him that this was the reason why he dismissed him. (Tr. 152-3.)

It is clear from this that the record of the United States Commissioner was not complete, that his testimony was uncertain and there was no positive assurance on his part of just what was done. It is true that when shown an affidavit signed by him and dated February 1, 1934 (one year after said order of Frank H. Kerrigan), he said that he recollected signing it and that it was correct. It must be remembered that his records were incomplete and do not reflect the extent of the proceedings before him. The testimony he gave is the best recollection and as he says himself, "I do not feel certain of my statement when I say that was

my course of conduct in that case because I have so many cases."

This is just why the courts adhere to upholding orders as against collateral attack. The order was made five days after the hearing before the United States Commissioner, the United States Attorney concurred, now he seeks by very uncertain testimony, to say the least, to set aside that order. If he is successful, then no order is free from attack.

The burden was upon the United States Attorney to affirmatively show that the proceedings before the United States Commissioner revealed no action taken on the motion to suppress. That by reason of the uncertainty of the testimony and the incompleteness of the record of the Commissioner, the United States Attorney failed to make the proper showing. The photostatic copies of said papers should not have been admitted in evidence.

That these papers were detrimental to the defendant cannot be denied. They contain memoranda relative to sugar, argo, yeast, a note from the water company, besides highly immaterial matter such as auto operator's license, bank deposit slips, purchaser's receipts for foreign money order, and insurance policy holder's identification card. They could only be received as admissions to show his connection with the still in question. Some of the items referred to in said memoranda, such as sugar, could have been used in the still operations, but so could it have been used in connection with other matters and for legitimate purposes.

This type of admission is dangerous and should be received with great caution. The jury upon hearing of items of sugar, yeast and reading the note from the water company and the translation (U. S. Exhibit 11), would be strongly inclined to believe that because of them the defendant Antonio Rocchia was connected with the still. It was error to receive them and prejudicial to the defendant. The prejudicial effect of these papers was aggravated by reason of the comments of the United States Attorney and the court in connection with testimony in relation to them. The record shows that when objection to their use was duly made, the United States Attorney said that "if the defendant desires to produce them we will be glad to use them". (Tr. 119.) The jury was no doubt impressed with the remark and naturally looked to the defendant for the originals. Great significance was given to it when the court in refusing to instruct the jury to disregard it said that "He (U. S. Attorney) can demand any document proper to be introduced by you (defendant)". (Tr. 120.) When the court's attention was called to this latter statement, the court upon due request refused to instruct the jury to disregard it. (Tr. 121.) The jury was then firmly convinced that the defendant was withholding papers that should have been produced. They were anxious to know what they were and were careful to note them when received in evidence. The papers so received were clearly detrimental to the defendant and greatly prejudiced him before the jury.

III.

THIRD GROUND FOR REVERSAL.

ERROR OF COURT IN ADMISSION OF NOTE OR MEMORANDUM WRITTEN BY H. VON HUSEN, INSPECTOR, SAN FRANCISCO WATER DEPARTMENT.

(Assignment of Error 40; Tr. 11-12, 14, 23, 27, 35; Exhibits 7 and 8.)

Harold Von Husen called for the United States testified that on January 4, 1933, as an inspector for the San Francisco Water Department he called at 60 Brady Street, San Francisco to read water meter; that there was a very large delivery of water at 60 Brady Street, San Francisco, and the meter was running wide open. He knocked on the door at the office and got no response; that he looked inside but could see no one because of all the partitions there. He went to the garage door, the folding door, and pounded on it with his book, but got no response. He left a note and put it under the small door. Over objection and exception of the defendant (Tr. 149, 150) the United States Attorney showed the witness a photostatic copy of a note (part of U. S. Exhibit 8) he left under the door. He stated that it was a true copy. The note was read in evidence and is as follows:

> "I have shut off your water at valve in water box. Meter running wide open. Pipe must be broken inside as water bill for month of Dec. will be over $75.00. Would advise getting plumber and called at office 425 Mason street.
>
> Von Husen, Inspector, S. F. Water Department 1/4/33 1:30 P. M."
>
> (Tr. 149-151.)

The witness stated he never saw the defendant Rocchia before the time of trial. The original of photostatic copy of said note was taken from the person of the defendant by Investigator Burt at the time of his arrest and search. (Tr. 140.) Objection and exception were made to the introduction in evidence of said note. (Tr. 143.)

There was no evidence introduced by the Government to show that said note was ever answered or acted upon. It may be that defendant when he entered the premises through the small door picked up the note and put it in his pocket. Investigator Burt did not see the defendant until he came from the small room to the large room. (Tr. 138.) The receipt in evidence of said note was prejudicial error. In *Poy Coon Tom v. United States,* 7 F. (2) 109 at 110, C. C. A. 9, Judge Rudkin in considering a similar question, held as follows:

> "In the course of the trial, the following letter, found in the possession of the plaintiff in error upon a search of his home, was offered in evidence against him, and was admitted over objection and exception:
>
> 'Dear friend Tom: Come on over this afternoon. No one will see you come in. So you come in the back way. I will watch for you. I want to see you on business. I am giving you something so come this afternoon—so we are alone and can talk, I want to see you about something. I may go to the hospital tomorrow. I am so worried I can hardly write now. Tom, do as I tell you. If you don't come this afternoon I cannot give you anything. Bring about one M and 2 C with you.

Now, be sure to come, for I may not get a chance to talk with you soon again; and I want to pass you on to something and cannot very well, unless we are alone. Come any time after one o'clock. Now, do it. If you don't, you may be sorry.'

The prosecuting officer stated to the court that M and C referred to morphine and cocaine, and that his purpose in offering the letter was to show that the plaintiff in error was a known trafficker in narcotics, and that he had not only sold narcotics to the informer in question, but to others as well.

We do not understand upon what principle the letter was admitted or was competent. It was manifestly not admissible as the unsworn declaration or statement of the unknown writer, and it was equally inadmissible for the purpose of showing an admission or an implied admission on the part of the plaintiff in error, in the absence of proof tending to show that the letter was answered or otherwise acted upon.

'The fact that an unanswered letter or other paper is found in the custody of a party, but not acknowledged by him, is not ground for the admission of the paper as evidence against him. Were it admitted, an innocent man might, by the artifice of others, be charged with a prima facie case of guilt, which he might find it difficult to repel.' Wharton's Crim. Ev. (10th Ed.) p. 1411.

'It is also urged that the letter was admissible as a tacit admission by the accused of the truth of its statements, it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements, but it has been uniformly held

by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter.' Packer v. United States, 106 F. 906, 910, 46 C. C. A. 35, 39.

'The letters, however, if properly identified, would not of themselves authorize any inference against the defendants; they were only the acts and declarations of others; and, unless adopted or sanctioned by the defendants, by some reply or statement, or by some act done in pursuance of their suggestions, they ought not to prejudice the defendants. Letters addressed to an individual, and received by him, are not to have the same effect as verbal communications. Silence, in the latter case, may authorize the inference of an assent to the statement made, but not equally so in the case of a letter received but never answered, or acted upon.' Commonwealth v. Eastman, 1 Cush. (Mass.) 215, 48 Am. Dec. 596.

'The maxim (qui tacet consentire videtur) had also been applied, as between the parties, to certain mercantile dealings, as where an account current was sent to the party by letter, and no objection made to it within a given time, established by convenience or by commercial usage. * * * But it could not, in principle, be applicable to facts stated in a letter which the party was not bound, nor interested, to answer. It would be placing a man entirely at the mercy of others, if he was to be bound by what others chose to assert, in addressing letters to him. In no sense, could his silence be considered an admission of such facts.' People v. Green, 1 Parker Cr. R. (N. Y.) 17.

* * * * * * *

> The admission of the letter was therefore prejudicial error. We find nothing in the remaining assignments calling for comment or consideration.
>
> The judgment is reversed, and the case is remanded for a new trial."

It is evident from the above that defendant Antonio Rocchia was substantially prejudiced by such evidence.

Said note of Von Husen was addressed to no one. This document was offered as an admission to show his connection with said still. It no doubt had great weight with the jury.

IV.

FOURTH GROUND FOR REVERSAL.

ERROR OF COURT IN ADMISSION OF FINGERPRINT CARD DATED OCTOBER 1, 1930, SIGNED ANTONIO ROCCHIA AND HAVING NO RELATION TO CASE AT BAR.

(Assignments of Error 43, 44, 45; Tr. 74, 76.)

THE UNITED STATES ATTORNEY HAD NO RIGHT TO USE SAID FINGERPRINT CARD (U. S. EXHIBIT NO. 14) AS A HANDWRITING EXEMPLAR.

The evidence shows that during the course of the trial Investigator De Kalb produced from the files of his office two fingerprint cards; one was marked case No. 20,895, dated October 1, 1930, and signed Antonio Rocchia; the other was marked S. F. 24,928-F, dated January 9, 1933, and signed John Caruso. (Tr. 131.)

Said fingerprint cards No. 20,895 and No. 24,927 were thereupon marked as one exhibit, to-wit, U. S.

Exhibit 7 for identification, and later over objections and exceptions, card No. 20,895 as U. S. Exhibit 14 in evidence (Tr. 167) and card No. 24,927 as U. S. Exhibit 3 in evidence. (Tr. 134.) The United States Attorney stated that he hoped to establish the signature on the lease (U. S. Exhibit 13) by identifying certain signatures. (Tr. 131.)

By way of further exemplars as handwriting specimens the Government offered in evidence the appearance bond in the case at bar. (U. S. Exhibit 12.) In connection with this exhibit, it was conceded by defendant's counsel that the signature on said bond was in the handwriting of the defendant Antonio Rocchia. (Tr. 159.) The Government also used as an exemplar containing a specimen of the handwriting of the defendant, a certain sheet of paper containing a list of words and figures in two columns. This sheet of paper is part of U. S. Exhibit 7 (Tr. 161) and was taken from the person of the defendant at the time of his arrest and search. (Tr. 140.) When said sheet of paper was given to the handwriting expert, he was told that it might be Rocchia's handwriting. That it might not be fully identified. (Tr. 165.) Before using said sheet of paper as an exemplar, it was necessary for said expert first to establish it as being in the defendant's handwriting from other exemplars which was done. (Tr. 165.) It is well to note at this time that on fingerprint card dated October 1, 1930 (U. S. Exhibit 7 for identification and later received as U. S. Exhibit 14), the signature of Antonio Rocchia was not identified by any witness, and that the Gov-

ernment sought to prove it through the handwriting expert by comparing the fingerprints thereon with the fingerprints on U. S. Exhibit 3. (Tr. 162.) The testimony and objection in this case is as follows:

> "MR. GOULDEN. Q. You have examined the fingerprint on the card, Government's Exhibit No. 3, (in evidence) have you, John Caruso?
>
> A. Yes.
>
> Q. Have you also examined the fingerprint on the card Government's Exhibit No. 7 for identification, (U. S. Exhibit No. 14 in evidence) Antonio Rocchia?
>
> A. Yes.
>
> Q. Are you prepared to say whether or not the fingerprints are of the same man?
>
> A. I am——
>
> MR. PERRY. Just one moment, please. I am going to make an objection now, and I will make an objection later on; I am going to object to the further use of the fingerprints. As I understood it, when these documents were introduced in evidence first the only use of the documents was for the purpose of the handwriting. Now counsel for the Government endeavors to use by way of comparison the fingerprints on those two cards and by those two cards, I mean Government's Exhibit No. 3 in evidence and Government's Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence). I mention this at this time your Honor, because they are trying to introduce or show prior transactions that this defendant may have had in other matters and to bring it in in this manner, and which could not have been brought into this court in any other way. In other words, by a subterfuge they are bringing in under the guise of

the handwriting matter something to use against this defendant. I object to it on that ground and as a matter of principle.

THE COURT. It is certainly pertinent evidence and I will overrule the objection. Let us proceed with the examination.

MR. PERRY. Exception.

MR. GOULDEN. Q. Would you say at this time in your expert opinion that the fingerprints on the two cards (U. S. Exhibit No. 3 in evidence and U. S. Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence),) are one and the same man?

MR. PERRY. I object to it on the ground that the use of these documents is prejudicial so far as the defendant Rocchia is concerned, and I assign the examination and the use of those documents with respect to fingerprints by the United States Attorney as misconduct, and I ask your Honor to instruct the jury to disregard it.

THE COURT. The objection will be overruled.

MR. PERRY. Exception.

A. They are the fingerprints of one and the same man." (Tr. 162, 163.)

Thereafter the Government offered in evidence fingerprint card U. S. Exhibit 7 for identification, and it was then marked as U. S. Exhibit 14 in evidence. (Tr. 167.) Said offer and objection in connection therewith is as follows:

"MR. GOULDEN. I neglected or I overlooked requesting that Government's Exhibit No. 7 for identification be admitted in evidence. Professor Heinrich identified it, that being the fingerprint card with the signature Antonio Rocchia upon it.

THE COURT. Then this will be received as U. S. Exhibit 14 in evidence.

MR. PERRY. I object to it as immaterial, irrelevant, and incompetent, and upon the ground that it is prejudicial to the rights and interests of my client to introduce this document in evidence bearing his purported fingerprints and his signature; it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth amendments.

THE COURT. Ruling will stand.

MR. PERRY. Exception." (Tr. 167.)

It is well to pause here for a moment and get the significance of this proof. The U. S. Attorney attempted to prove a writing on a fingerprint card (U. S. Exhibit 7 identification, U. S. Exhibit 14) with another fingerprint card by comparing the fingerprints. (U. S. Exhibit 3.) He does it so that he can use the unproven signature as an exemplar in connection with the signature on the lease regardless of the irrelevant and prejudicial matter contained in said exemplar.

Said Exhibit 14 besides bearing the signature Antonio Rocchia and the fingerprints, also contains the following notation:

"Case No. 20895
Date of Arrest October 1, 1930
Charge—Possession Still and whiskey
Criminal History
Antonio Rocchia No. 20226
San Francisco charge mdfg."

(The original exhibit was duly certified and filed with the clerk of the Circuit Court of Appeals.)

This prior record of Antonio Rocchia has no place in this trial and to offer it was prejudicial. Let us proceed further to the utter lack of necessity for its use as an exhibit as a handwriting exemplar. The exemplars used by the handwriting expert may be summarized as follows:

(1) Finger-print card No. 24,298 bearing the name of John Caruso, U. S. Exhibit 3;

(2) Finger-print card No. 20,895, bearing the written name of Antonio Rocchia, U. S. Exhibit 14;

(3) Appearance bond bearing a signature in the handwriting of Antonio Rocchia, U. S. Exhibit 12, and

(4) A sheet of paper containing some writing and taken from the person of the defendant when arrested, U. S. Exhibit 7.

With these exhibits U. S. Exhibits 3 and 12 were established as being in the handwriting of Antonio Rocchia. As to U. S. Exhibits 7 and 14 they were disputed handwritings and were given as such to the handwriting expert. (Tr. 165.) It is apparent that were the handwriting expert to establish the identity of the person signing the lease (U. S. Exhibit 13) it would be necessary for him to establish that the disputed exemplars (U. S. Exhibits 7 and 14) were in the handwriting of the defendant and then in turn use them as exemplars. There were other undisputed exemplars available to the U. S. Attorney as will hereafter appear. In this connection Edward O. Heinrich, the handwriting expert testified as follows:

"Q. Was Exhibit 7 (in evidence) used as an exemplar, or was it used for the purpose of determining whether or not Rocchia's writing was on that document?

A. Primarily, it was identified as being probably in Rocchia's handwriting. From the signatures I identified it as his handwriting, and therefore used it to some extent as a guide in considering the other evidence. * * * (Tr. 164.)

I did not have any other writings as the foundation or basis for my expert opinion. It was only told to me that that might be Rocchia's handwriting on Government's Exhibit 7 in evidence. When they submitted all these documents they were variously described. U. S. Exhibit No. 7 was described as an exemplar with a reservation that it had not been fully identified; that is the way it was presented to me. I included it in one of my exemplars with that reservation until after I had established my basis on the comparison of signatures, and thereafter I considered it with relation to the signature. * * * (Tr. 165.)

On government's exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence) being a fingerprint card and signed Antonio Rocchia and dated October 1, 1930, I examined the signature Antonio Rocchia on that document as well as the fingerprints on that document. * * * (Tr. 161.)

"MR. GOULDEN. Q. You have examined the fingerprint on the card, Government's Exhibit No. 3, (in evidence) have you, John Caruso?

A. Yes.

Q. Have you also examined the fingerprint on the card Government's Exhibit No. 7 for identification, (U. S. Exhibit No. 14 in evidence) Antonio Rocchia?

A. Yes.

Q. Are you prepared to say whether or not the fingerprints are of the same man?

A. I am." (Tr. 162.)

After due objection and exception the witness was permitted to testify as follows:

> "They are the fingerprints of one and the same individual." (Tr. 163.)

This certainly was a roundabout way of proving a disputed signature. To say the least, the method of proof was not only most unusual but highly unsatisfactory. These were not the only exemplars available to the Government. There are others which contained the undisputed signature of the defendant. Let us look at the record and see what exemplars were available: The verified plea in abatement and motion to suppress subscribed by defendant Antonio Rocchia (Tr. 80); verified amended plea in abatement and motion to suppress subscribed by said defendant. (Tr. 88.) These are the only ones appearing in the record. There were, no doubt, other exemplars that could have been used, such as the appearance bond signed by the defendant filed with the United States Commissioner in connection with the preliminary hearing. The Government was in the possession of these additional exemplars and the signatures undisputed. This indicates that the Government was not sorely in need of undisputed exemplars. The Government does not even claim the lack of exemplar material.

Why then did the Government use the writing, Antonio Rocchia, on the disputed fingerprint ex-

emplar (U. S. Exhibit 14) to aid in proving a materially disputed document? (U. S. Exhibit 13.) It was only done to prejudice the defendant before the jury by letting them know that the Government already had his fingerprints and getting before them the prior record of the defendant which was set out in said fingerprint card.

Under the facts of this case the fingerprint card should not have been received for any purpose. There was no question of the defendant's identity nor was his character in issue. His character becomes an issue when tendered by him. This, he did not do. The only admitted purpose for which said fingerprint card (U. S. Exhibit 14) was received in evidence was as an exemplar to prove the handwriting on the lease. The statement of his prior criminal record on said fingerprint card affected his character and was therefore prejudicial.

In such a situation, to-wit, where the government is in possession of evidence definitely establishing the point, it is error to even remotely touch upon a prior offense, which error is prejudicial in nature. In *Fish v. U. S.*, 215 F. 544, the defendant was charged with the arson of a certain schooner with intention to prejudice the underwriters who had insured the same. The evidence beyond a doubt established the fact that the defendant had set the fire which caused the destruction of the yacht. Notwithstanding, evidence was introduced that two years prior to the instant offense, defendant had suffered the loss of another yacht, together with an automobile, under cer-

tain circumstances which would reasonably lead to the conclusion that those two fires as well had been incendiary in nature. The court held that the proof of the two prior alleged offenses was not in order by reason of the facts of the case and its admission was prejudicial, saying:

> "Such being the state of the proof negativing any idea that the fire might be accidental, we are of the opinion that this was not a case where evidence of previous fires should have been received for this purpose. Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case. People v. Sharp, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. Lepage, 57 N. H. 245, 295, 24 Am. Rep. 69." (at page 549.)

and further stated with reference to the proof of a prior offense, quoting from *State v. Raymond,* 21 Atl. 330:

> "There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition." (215 F. at 551.)

It is evident that the introduction of such proof goes to the character of the defendant, which matter is not in issue until such a time as it is tendered by him by his taking the stand and further opening the issue by the introduction of character proof on his part. So

in *People v. Sharp,* 14 N. E. 319, a New York case, the action was for bribing a public official, which proof was adequately shown. Further evidence was adduced to show an alleged prior bribing of another official. The court said:

> "The commission of a crime by Sharp in 1884 was distinctly in issue. It was bribery but the subject was Fullgraff * * * (the case for which the defendant was being tried). In the commission of that crime the law presumed Sharp to be innocent. If Sharp had given evidence of good character the prosecution might have answered that evidence by proof that his character was bad; but I believe it has not been thought by any judicial tribunal that such evidence could be given in anticipation of proof from the defendant, nor that the issue upon it could be tendered by the prosecution." (citing cases) (page 339).
>
> "The indictment is all that the defendant is expected to come prepared to answer. Therefore the introduction of evidence of another and extraneous crime is calculated to take the defendant by surprise and do him manifest injustice by creating a prejudice against his general character." (p. 339.)

Let me repeat again, it is evident that the intention of the District Attorney in the case at bar was to introduce into evidence and to prejudice the defendant by proof in a roundabout manner, the introduction of which would be not allowed directly, of a prior offense. A case similar in effect is *Mercer v. U. S.,* 14 F. (2) at 281 (3rd Circuit). Therein a prior attorney for one of the defendants was put on the

stand and asked if he did not know that the defendant had been tried and convicted prior thereto of forgery. Objection was made on the grounds of prejudice and overruled and the question put again, to which an objection and exception were taken. The court held the attempt to be improper, prejudicial and to render a fair trial impossible. That having failed to take the stand, his reputation and character were not in issue and proof to controvert the same was not admissible; that the evident purpose of the District Attorney was to get before the jury damaging statements in violation of all rules of evidence. The court, at page 283, stated as follows:

> "*The defendant was presumed to be innocent until his guilt of the offense charged was proved. If he had offered himself as a witness, he might, like any other witness, have been questioned, within well-defined limits, as to any former conviction, for the purpose of affecting his credibility. But, not having testified, and not having put in issue his reputation for good character, or his credibility, the general rule of law is that evidence assailing his character or showing previous conviction is not admissible.* * * * When the defendant does offer himself as a witness, his previous conviction may be shown only to affect his credibility. * * * *The evident purpose of the assistant United States attorney, and what he actually did, was to get before the jury, in violation of all rules of evidence, damaging statements,* put in the form of questions, which greatly prejudiced the defendant.
>
> However depraved in character, and however full of crime the past life of the defendant may

have been, he was entitled to a fair trial on competent evidence. Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077. Otherwise our courts would cease to be courts of law and become courts of men. Liberty regulated by law is the underlying principle of our institutions. Sparf and Hansen v. United States, 156 U. S. 51, 103, 715, 15 S. Ct. 273, 39 L. Ed. 343.

The learned District Judge in his charge referred to the objectionable statements, and said that, in view of Hamill's answer, there was no evidence of Mercer's previous conviction, and the jury should not consider it in passing upon his guilt. But they were not stricken out. They still stand in the record, and the jury was left under the impression, or, at least, might draw the inference, that they might consider them to affect the credibility of Hamill, and discredit him. *These statements were improper, prejudicial, and rendered a fair trial impossible.* * * *" Reversed.

In *Beyer v. U. S.,* 282 F. 225, paragraph 4, C. C. A. 3, the facts showed the defendant was charged with possession for sale on June 19, 1920. He denied such possession and stated that he had not sold any since repeal started. Under cross-examination he testified that he did not have any liquor in his place since the time prohibition went into effect. He was then asked by the United States Attorney if he recalled a seizure of liquor made in his place on March 10, 1920. He said that he might have had a bottle that day for his own use. The Government witnesses in rebuttal were permitted to testify to finding three bottles in de-

fendant's safe. This was held to be prejudicial error. The court, at page 227, said:

> "While proof of the possession of liquor at another time was collateral and immaterial, so far as establishing the issue on trial was concerned, its effect upon the jury was detrimental and prejudicial to the defendant. Evidence that he committed other crimes at other times may not be admitted to show that he had it within his power and was likely to commit the particular crime with which he was charged. * * * It is easy to see how such evidence might prejudice the jury, render a fair trial impossible, and lead to conviction.
>
> We are therefore constrained to reverse this case and grant a new trial."

In the case at bar had the defendant taken the stand the Government could not have examined him in relation to the charges as they appeared on the fingerprint card. Much less could it be done without him taking the stand.

A similar case to the case at bar arose in *People v. Van Cleave,* 208 Cal. 295, wherein the defendant was convicted of the crime of burglary. His identity was made from the presence of certain fingerprints on the drawer of a trunk and by testimony of an expert in the police department. Nevertheless the fingerprint card from the prior burglary was admitted in evidence over objection and the same was held to be error, the court saying at page 300:

> "After appellant's arrest his fingerprints were taken by an expert in the police department. The

expert testified that the distinguishable thumb-print on the metal bar which held in place the drawers in the trunk of the complaining witness was the counterpart of a thumb-print taken by himself from appellant and that it was made by appellant. Some time later the prosecution offered in evidence fingerprints upon a card found in the identification bureau of the police department and bearing the name of appellant. The expert testified, over the objections of appellant, that he had examined this card as a part of the investigation leading up to the arrest of appellant and that a thumb-print upon it was made by the same thumb which made the print on the metal bar and the one taken by him from appellant after his arrest. The fingerprints on the card were taken at some time before the burglary was committed with which appellant was charged and for which he was convicted in the present action. The card was admitted in evidence over the objection of appellant. This was error. The exhibit was offered merely because it was inspected by the finger-print expert during the investigation which preceded appellant's arrest. It was not admissible for that reason, nor can we conceive of any other ground upon which it was entitled to a place in the record, and it demonstrated to the jury that appellant once before had been in the hands of the police."

From the above it appears that the United States Attorney had other exemplars from which to choose to prove the disputed signature on the lease; that there was no necessity to use said fingerprint card containing said prior criminal record.

The introduction of said fingerprint card was most detrimental. It showed that he was arrested by the Government for a similar offense, taken into custody and fingerprinted. No disposition of the case was shown. It must be remembered that the case at bar was a close one. The jury disagreed on the seventh count of the indictment. They returned a verdict on the other six counts, charging in effect the possession of a still, and manufacture. In view of the prior record on said fingerprint card the jury in arriving at its verdict must have been influenced thereby. It is apparent that the defendant was prejudiced by such evidence.

V.

FIFTH GROUND FOR REVERSAL.

MISCONDUCT OF COURT AND UNITED STATES ATTORNEY AND ERROR OF COURT IN REFUSING TO INSTRUCT JURY IN CONNECTION WITH SUCH MISCONDUCT.

(Assignments of Error 13, 13-A-B-C; Tr. 30-44.)

For convenience these assignments will be consolidated and argued together.

The following is one assignment which has within it all the errors assigned. For brevity we are incorporating it at length herein instead of setting out each assignment separately.

> "Agent DeKalb testified:
>
> 'MR. GOULDEN. Q. What did you find on the defendant when you made a search of the defendant?

MR. PERRY. For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

MR GOULDEN. There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

MR. PERRY. I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

THE COURT. This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know whether you are getting into a situation

where you are proposing to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of this evidence.

MR. PERRY. I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

MR. GOULDEN. There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

MR PERRY. I object to that as an improper remark by counsel.

THE COURT. I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

MR. PERRY. I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the

Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

THE COURT. The Court refuses to receive the instruction.

MR PERRY. I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

THE COURT. The objection will be overruled.

MR. PERRY. And, furthermore, with all due respect to your Honor, I take an exception to your Honor's remarks. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

THE COURT. I don't recall any such statement on the part of the court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

MR. PERRY. I ask your Honor to instruct——

THE COURT. You will find that I didn't suggest any subpoena or any other action.

MR. PERRY. You stated he could call on the defendant to produce certain documents.

THE COURT. The objection will be overruled.

MR. PERRY. I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself.' " (Tr. 118-122.)

The errors in connection with the above may be summarized as follows:

1. Misconduct of United States Attorney.

2. Error of Court in connection with misconduct of United States Attorney.

3. Misconduct of court.

4. Error of court in connection with its own misconduct.

The statement by the District Attorney "Mr. Goulden * * * if the defendant desires to produce them we will be glad to use them" in referring to the documents taken from the defendant Rocchia is in effect a challenge to the defendant to produce the said records. (Tr. 43.)

The statement by the court "he can demand any documents proper to be introduced by you. If he is demanding them it is true that he has not gone through the formality of a notice to produce, for instance * * *" (Tr. 43) in referring to the remarks of the District Attorney, is not only a condoning the District Attorney's remarks, but it in effect amounts to republication of them.

Such conduct on the part of the District Attorney and the court, has been expressly denounced and held to be prejudicial to the rights of the defendant in

McKnight v. U. S., C. C. A. 6, 115 Fed. 972, 977. In the *McKnight* case the record disclosed the following:

"Q. Will you please read that paper?

(Question objected to by the defendant.)

BY THE COURT. The paper from which this was taken was last found in the possession of the defendant. Now, if the district attorney chooses, he can demand the production of that paper.

MR. HILL. I do demand that paper.

THE COURT. Is it produced, or is it desired to produce it, by the defendant?

COL. BRECKINRIDGE. We deny the right of the district attorney to make the demand.

BY THE COURT. That, of course, is involved in your objection. The question is, do you produce it?

COL. BRECKINRIDGE. We want to save exception to your honor's suggestion.

THE COURT. You can reserve any exception you please. The court rules this can be received as secondary evidence only after a demand has been made for a production of the original. The district attorney has demanded, in the presence of the court, the original paper.

COL. BRECKINRIDGE. The defendant first excepts to the demand being made now, as not being legal; second, there is no such paper in his possession.

THE COURT. That is not the question. You do not produce the paper?

COL. BRECKINRIDGE. In answer to the demand of the district attorney, counsel for the defendant announce that there was no such paper in existence. Therefore, it never was in his

possession, and no such demand can be complied with.

BY THE COURT. The essential thing is, you decline to produce it.

COL. BRECKINRIDGE. No, sir; 'declining' means we have the power to do so.

THE COURT. Oh, no.

COL. BRECKINRIDGE. I should think it does.

THE COURT. You decline to produce it. The defendant failing to produce the paper upon the demand of the district attorney, this can be offered.

COL. BRECKINRIDGE. We desire an exception to your honor's ruling that the district attorney has a right to demand a production of the paper from us.

THE COURT. The court does not rule anything, except to inquire whether the district attorney has made this demand. The court says it cannot allow the contents of that paper to be presented unless the proper foundation has been laid by a demand for the production of the original. The district attorney, as I understand it, has made this demand now for the production of the original paper, which was last heard of in the possession of the defendant. That demand not having been complied with, the court rules that this paper may be read.

COL. BRECKINRIDGE. To that the defendant excepts. We desire to go further, and not merely to except, but to say in answer to that demand that there was no such paper ever in the possession of the defendant, and therefore he does not decline to deliver the paper, but answers that there is no such paper to deliver.

THE COURT. That is a question of proof, entirely. Counsel cannot testify for the defendant.

COL. BRECKINRIDGE. No one can make answer for the defendant but the defendant himself.

THE COURT. He can testify in rebuttal to this proposition.

COL. BRECKINRIDGE. He can do more than that, and we object to the statement as to his right to testify.

THE COURT. I did not mean he could testify in person, but he can introduce testimony in rebuttal of the proposition.

(And thereupon the jury were told by the court to disregard the statement first made.)

COL. BRECKINRIDGE. A demand is made in the presence of the jury and the defendant simply answers the demand which, under the permission of the court, and in the presence of the court and this jury, the district attorney has made.

BY THE COURT. The court makes no suggestions, except as stating the rule of law in regard to proof by secondary evidence of the contents of this paper on the part of the United States. The rule of law is perfectly familiar to counsel, as well as to the court, that secondary evidence cannot be produced unless the original is accounted for, and the foundation for the introduction of secondary evidence is laid, which is well understood to be a demand on the party in whose possession the paper was last seen to produce it. Then, if that paper is not produced, the question is concluded, or evidence can be heard on one side or the other as to whether the

paper was ever in existence; and that is a matter for the jury to determine after hearing all the testimony."

The Sixth Circuit in holding that the comments with reference to the production of the paper by the defendant constituted reversible error, said at page 981:

> "A perusal of the decisions of the supreme court shows that no constitutional right has been the subject of more jealous care than that which protects one accused of crime from being compelled to give testimony against himself. The right to such protection existed at the common law, and was carried into the constitution, that the citizen might be forever protected from inquisitorial proceedings compelling him to bear testimony against himself of acts which might subject him to punishment. In the present case the accused, in the presence of the jury, was, by direction of the court, called upon to produce the document which it was alleged contained the corrupt agreement which was the basis of the note given by irresponsible persons for the funds of the bank by McKnight's direction. The production of such a paper would have been self-criminating to the defendant in the highest degree. It is true, the learned judge made no order requiring its production; but the accused, by the demand made upon him before the jury, after proof tending to show his possession of the document, was required either to produce it, deny or explain his want of possession of the writing, or by his very silence permit inferences to be drawn against him quite as prejudicial as positive testimony would be. Nor were the jury

advised that the nonproduction of the writing afforded no ground for an inference of guilt. We think this procedure was an infraction of the constitutional rights of the accused, within the meaning of the fifth amendment to the constitution. Recurring to the opinion of Mr. Justice Bracley in the Boyd Case, supra, we may quote:

'It may be, it is the obnoxious thing in its least repulsive form; but illegitimate and constitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be legally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the court to be watchful of the constitutional right of the citizen, and against any stealthy encroachments thereon. Their motto should be, "Obsta principiis".' "

See, also, *Gillespie v. State,* 115 Pac. 620, 35 L. R. A. (N. S.) 1171.

The District Attorney after having learned that certain letters were in the possession of the defendant, then and there, in open court asked the defendant and his attorney to produce them. Upon exception being taken thereto the District Attorney withdrew and corrected the state's request and thereupon called upon the attorney for the defendant to produce the letters. The defendant excepted and in connection

with the prejudicial effect of said demand the court held:

> "It is true that making a demand upon a defendant to produce such letters or papers is a different thing from forcing him to produce them; but the effect is the same, because if a defendant refuses to comply with such a demand it is equivalent to admitting that the evidence demanded would incriminate him, if it were produced. The observation and experience of all practising attorneys will sustain the statement that such an inference is more damaging to a defendant than a proven fact would be. When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminate himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon.
>
> We are sustained in these views by the case of *McKnight v. United States,* 54 C. C. A. 358, 115 Fed. 972. * * *
>
> For the error above pointed out, the judgment of the trial court is reversed, and the cause is remanded for a new trial." (35 L. R. A. (N. S.) at pages 1173 and 1174.)

All the Government had to do was to show that the documents were in the defendant's possession. It was not necessary, as in civil cases, to make demand either in open court or by notice.

> *Lisansky v. United States,* 31 Fed. (2d) 846 at 850.

When the Government goes beyond this step it enters into the field of error. This is what the United States Attorney did when he said, "If he wants to produce them we will be glad to use them". He was then and there calling on defendant to testify and this comment tended to and did create a presumption against the defendant for his failure to produce said paper. In this connection in *Wilson v. United States,* 149 U. S. 60, at 67, it was held:

> "It should have been said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify."

The court in the case at bar did not admonish the United States Attorney that he was forbidden to make any such comment, and not only refused to instruct the jury to disregard his remarks but then and there stated in the presence of the jury that "he (U. S. Attorney) could demand any documents proper to be introduced by him (defendant)". When the court's attention was called to this additional error and was requested to instruct the jury to disregard it the court refused to so instruct.

The court was then and there duty bound to instruct the jury promptly and in no unmistakable terms. A failure to do so was prejudicial error.

In *Wilson v. United States,* 149 U. S. 60, at 66 and 67, it was held:

> "When the District Attorney, referring to the fact that the defendant did not ask to be a

witness, said to the jury, 'I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime,' he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by a failure to offer himself as a witness. And when counsel for defendant called the attention of the court to this language of the District Attorney it was not met by any direct prohibition or emphatic condemnation of the court, which only said: 'I suppose the counsel should not comment upon the defendant not taking the stand.' It should have said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify.

Instead of stating, after mentioning that the United States court is not governed by the State's statutes, 'I do not know that it ought to be the subject of comment by counsel,' the court should have said that any such comment would tend necessarily to defeat the very prohibition of the statute. And the reply of the District Attorney to the mild observation of the court only intensified the fact to which he had already called the attention of the jury: 'I did not mean to refer

to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf,' which was equivalent to saying, 'You gentlement of the jury know full well that an innocent man would have gone on the stand and have testified to his innocence, but I do not mean to refer to the fact that he did not, for it is a circumstance which you will take into consideration without it.' *By this action of the court in refusing to condemn the language of the District Attorney, and to express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the minds of the jury that if he were an innocent man he would have gone on the stand as the District Attorney stated he himself would have done.*"

In the case at bar the court not only failed then and there to instruct the jury to disregard the comments of the United States Attorney, but made it more impressive by saying that the United States Attorney could demand any documents proper to be introduced by the defendant, which itself was error, and for which the court likewise refused to instruct the jury to disregard. (Tr. 118-122.) The court in *Wilson v. United States,* (supra), at page 68, said as follows:

"The refusal of the court to condemn the reference of the District Attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should

be corrected by setting the verdict aside and awarding a new trial."

In *De Mayo v. United States*, 32 Fed. (2d) 472 (C. C. A. 8.), it was held as follows:

> "Lastly, error is assigned to the statement of the United States Attorney in argument, calling attention in an indirect, but very damaging way, to the fact that De Mayo had failed to take the stand."

The objectionable statement was that the District Attorney pointed to the defendant and stated "that he sat silently in his seat and allowed this poor innocent girl to take the stand and tell what happened out there that night in the house". After due objection the court stated "that if there was any reference to the defendant keeping his seat, of course that is improper argument and it will not be considered by the jury and they will be instructed not to consider it".

In commenting on the failure of the trial judge to promptly and emphatically admonish the jury to disregard the statement the court at page 475 said:

> "Such reference is reversible error unless the court sharply, emphatically, and promptly advises the jury that the matter is improper and that they should give no consideration thereto. This should be done in unmistakable and positive terms. To that extent, at least, if not to a greater extent, counsel should be rebuked. This is one of the most damaging acts on the part of a prosecutor that can be committed in the course of a trial, not only from the standpoint of the defendant, but be-

cause of its effect upon the case generally, and should not be condoned. We do not think the court in this case dealt strongly enough with the situation.

* * * * * * *

It follows that the judgment below must be reversed and remanded, * * *"

It will be seen from this that indirect reference is not permitted.

In *Barnes v. United States,* 8 Fed. (2d) 832, at 834 (C. C. A. 8) it was held:

"Error is next assigned on behalf of both defendants because of a statement made by the prosecutor, Higgs, in argument. He said:

'The witness Pryor took the stand and testified he bought dope from these defendants, and not a human being has testified that in so testifying Pryor lied.

MR. HARVEY. I object to that as an incompetent statement.

THE COURT. Yes, that is improper, Mr. Higgs, under the circumstances in this case.

MR. HARVEY. And it is a statement that is prohibited by law, under the statute.

THE COURT. Yes; that is true.

MR. HIGGS. I take it that that is a state statute. I would like to show you——

MR. HARVEY. It is a clear and unquestioned reference to the fact that none of the defendants took the stand, but saw fit to stand upon the government's testimony——

THE COURT. The court rules that it is improper.

MR. HARVEY. Such a statement as that, your honor, makes unlawful the further hearing of this cause, after a statement of that kind is made to the jury here, and I move now the discharge of this jury, on the ground that that statement has disqualified them.

THE COURT. The court refuses to accede to that request. He did not say anything about the source of this evidence; not one word or syllable did counsel mention about the source of this matter; so it is only by inference that you get your objection sustained, at all. I am sustaining it fully, but the reference of counsel was only——

MR. HARVEY. Of course, a direct statement sometimes is stronger than an inference; but an inference may be as strong as a direct statement. I think that is the case here, that the defendants——

THE COURT. Nobody has mentioned the defendants but you, and you have just done that this second. The court is saying that it was highly improper for counsel for the government even to make the hint that you now have come out and cleared up. That is so far as the court is going in the matter.

To which ruling of the court the defendants, by their counsel, then and there at the time duly excepted.'

This assignment presents a serious question. The defendants had not testified in their own behalf. The court promptly declared the statement to be highly improper. He did not, however, charge the jury to disregard its effect, and refused to accede to the demand of counsel that the jury be discharged. The colloquy that ensued un-

> doubtedly emphasized and made prominent the potential application of the language used. We feel, therefore, constrained to hold that prejudicial error was thereby committed. * * * It follows, accordingly, that the case must be reversed and remanded for a new trial."

The colloquy that ensued in the case at bar undoubtedly emphasized and made prominent the potential application of the language used. The court repeated that the United States Attorney had a right to call for the papers and utterly failed to instruct the jury.

See also

Volkmor v. United States, 13 Fed. (2d) (C. C. A. 6) 594, Par. 1;

Tingle v. United States, 38 Fed. (2d) 573, at 576 (C. C. A. 8), Par. 8.

It will be noted that there was quite a discussion upon the part of the court in insisting that the United States Attorney could demand any documents proper to be introduced by the defendant. The jury was no doubt impressed with refusal of the court to instruct them to disregard not only the remarks of the United States Attorney but its own remarks. This was no doubt an unusual procedure with them. The jury listens attentively to every word and action of the court, especially on matters in dispute. It is most reasonable to conclude that the jury inferred that the United States Attorney was entitled to such original papers from the defendant and by his failure to produce them he was withholding something material to the case. It was a case then of either producing the

original or standing thereafter condemned in the eyes of the jury for withholding records from their consideration.

The only way the error could have been remedied was for the court then and there to instruct the jury in each instance as requested by the defendant. This was not done. We have previously shown that these papers were of such a nature that the introduction of the photostatic copies in evidence (U. S. Exhibits 7 and 8) was also prejudicial error.

VI.

SIXTH GROUND FOR REVERSAL.

ERROR OF COURT IN ADMISSION OF STATEMENTS MADE BY AND BETWEEN INVESTIGATORS BURT AND GOGGIN IN PRESENCE OF DEFENDANT.

(Assignments of Error 8, 9, 10, 21, 36, 38; Tr. 23, 26, 68, 69.)

The testimony in these assignments shows that on January 9, 1933, at 8:10 p. m. while Investigator Burt was in the still room defendant Antonio Rocchia entered, and was thereupon placed under arrest. Investigator Burt then and there searched said defendant and found a wallet with a number of papers and a quantity of currency, together with a purse containing currency. Investigator Burt kept the papers and handed back to Rocchia the wallet and small purse. About 10:00 p. m. Investigators De Kalb and Goggin returned to said still premises and found Antonio Rocchia in the custody of Investigator Burt.

Goggin walked over in front of defendant Rocchia who was seated on a yeast box and looked down and said to Investigator Burt, "It looks like you have the Big Shot", and Investigator Burt answered saying, "Yes, it looks as if I have, search him and see what you think". (Tr. 144, 5.)

The purpose of the objectionable testimony was to show what the defendant did under the circumstances. The general rule in this connection is as follows:

> "The doctrine of silence as an admission, broadly stated, is as follows: 'If. A, when in B's presence and hearing, makes a statement to which B listens in silence, interposing no objection, A's statement may be put in evidence against B whenever B's silence is of such a nature as to lead to the inference of assent. Silence under such an accusation is a circumstance to go to the jury on a question of guilt or innocence of the person who remains silent, and is a presumption of his acquiescence in the truth of the statement. Such statement may be made by the prosecuting witness; or by an accomplice; or by one of two persons acting in concert."
>
> *Wharton's Criminal Evidence,* 10th Ed. Vol. II, Sec. 679.)

This general rule is subject to certain limitations which are as follows:

> "The doctrine, then, of acquiescence by silence or conduct, is subject to the following limitations: * * *
>
> Fifth, the statement or accusation must be direct, and of a character that would naturally call for action or reply, and must relate to the particu-

lar offense charged, and must be addressed to, and intended to affect, the accused, and not arise in conversation or discussion between third parties."

Wharton's Criminal Evidence, Tenth Ed. Vol. II, Sec. 680.)

It is not every statement made in defendant's presence that is admissible.

In *McCarthy v. U. S.,* 25 Fed. (2) 298 at 299 (C. C. A. 6), it was held:

"This was error. Where accusatory statements are made in the presence of a respondent and not denied, the question whether his silence has any incriminating effect depends upon whether he was under any duty or any natural impulse to speak. Sometimes or often, in the earlier stages of the matter, there may be such a duty or impulse; but, after the arrest and during an official examination, while respondent is in custody, it is common knowledge that he has a right to say nothing. Only under peculiar circumstances can there seem to be any duty then to speak. Lacking such circumstances, to draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, 'If you say anything, it will be used against you; if you do not say anything, that will be used against you.' See comments of Shaw, C. J., in Com. v. Kenney, 12 Metc. (53 Mass.) 235, 46 Am. Dec. 672; Com. v. Walker, 13 Allen (Mass.) 570: Com. v. McDermott, 123 Mass. 440, 25 Am. Rep. 120; Porter v. Com. (Ky.) 61 S. W. 16, 17 and citations; State v. Weaver, 57 Iowa 730, 11 N. W. 675.

Also comment by Judge Learned Hand in Di Carlo v. United States (C. C. A. 2), 6 F. (2d) 364, 366. In Price v. United States (C. C. A. 6) 5 F. (2d) 650, the evidence of the accusatory statement and respondent's silence was received without objections, and it was not reversible error thereafter to refuse to strike it out.

We are satisfied that this error cannot be disregarded as nonprejudicial under section 269 of the Judicial Code (28 U. S. C. A. Section 391). We cannot say that it was not the element which turned the scales when the jury decided whether to believe the respondents, who later, as witnesses, denied all connection with the supposed offense.

The judgments must be reversed, and the cases remanded for a new trial."

In *Di Carlo v. United States,* 6 Fed. (2) 364, at 365 and 366, paragraph 1 (C. C. A. 2), it was held:

"At the police station that same night Pattitucci identified all four of the men before a number of witnesses, who so swore. The admission of this evidence, if incompetent, would, we think, in so close a case be a serious error.

The argument of the prosecution in support of these declarations will scarcely stand. They suggest that, as they took place in the presence of the defendants, they were admissible. But this is true only in cases where the trial judge with some warrant believes that from the conduct of the defendant after hearing himself identified a reasonable inference of acquiescence may be inferred. Christies Case (1914) A. C. 545; State v. Claymonst, 96 N. J. Law, 1, 114 A. 155. It is

a common error to suppose that everything said in the presence of a defendant is ipso facto admissible against him. While the question is a delicate one, dependent largely upon the discretion of the trial judge, nevertheless more must appear than that the defendant heard the statement. We think that the evidence of how the defendants met Pattitucci's accusation in the police station was plainly not enough to admit the identifications as admissions."

In *People v. Smith*, 64 N. E. 814, at 820, 1st column, it was held:

"It also admitted the evidence of the witness Emily Bugbee of the alleged statements of the defendant, not amounting to or including an admission of any fact relating to the homicide, but which related only to a mere newspaper report, apparently inspired by the witness to the effect that, although she had informed the defendant that the decedent could not talk, she had said to a newspaper reporter that the decedent had declared that he (the defendant) did it, and to which he added that she must have been mistaken, as his wife must have been calling for him. We are aware of no rule of evidence under which this proof was properly admissible. The learned trial judge was obviously of the opinion that the presence of the defendant rendered proof of everything that occurred or did not occur absolutely admissible, without regard to its character, by whom it was said, done, or omitted, or to the circumstances or conditions under which the acts or omissions of the decedent or of the defendant occurred. In that we think he was in error."

The court further held that evidence of party's conduct in response to questions is dangerous and should be received with great caution and in *People v. Smith* (supra), at page 820, 1st and 2nd columns, the court stated as follows:

> "The only possible ground upon which the silence of a party can be admitted as evidence against him is that it amounts to an acquiescence in a statement or act of another person. The rule admitting such evidence is to be applied with careful discrimination. *Such evidence is most dangerous, and should be received with great caution,* and not admitted unless of statements or acts which naturally call for contradiction, or unless it consists of some assertion with respect to his rights in which, by silence, the party plainly acquiesces. To have that effect, his acquiescence must be exhibited by some act of voluntary demeanor or conduct. If the claimed acquiescence is in the conduct or langauge of another, it must plainly appear that such conduct or language was fully known and fully understood by the party, before any inference can be drawn from his passiveness or silence."

The court in *People v. Smith* (supra), also held that if there is any doubt as to whether or not a reply should be made, the evidence should not be received, and at page 820, 2nd column, stated as follows:

> "The circumstances must not only be such as to afford him an opportunity to act or speak, but such as would ordinarily and naturally call for some action or reply from persons similarly situated. *If the condition be one of doubt as to*

whether a reply should have been made, the evidence should not be received."

From the above rules it appears that the statement to be admissible must be addressed to and intended to affect the accused. The statement in question was not addressed to the accused. The evidence shows that Investigator Goggin had the conversation with Investigator Burt. (Tr. 132.) There was no doubt from the tenor of Goggin's statement that it was intended that Burt should reply and not the defendant Rocchia. This is borne out by the nature of Investigator Burt's reply when he said to Goggin, "search him and see what you think." This clearly was an invitation to Goggin to search the defendant and Rocchia must have so considered it. It would have been futile to protest in either event. He had already been searched by Investigator Burt, and to him it meant submission to further search. Furthermore, as the record appears, the reply by Burt to search the defendant followed naturally from the statement by Goggin when he said, "It looks like you have the Big Shot." How could it be said that Rocchia should have replied when he was not even considered a party to the conversation? So far as the investigators were concerned that was a matter between them. Rocchia just merely served as a subject of conversation and then only in a very general way. It cannot be said that the question was such as would naturally call for a reply.

The defendant is not bound by statements arising in a conversation or discussion between third persons. *(Wharton's Criminal Evidence,* supra.)

Investigator Goggin saw Rocchia for the first time. He was, in fact, a mere stranger to any of the circumstances surrounding the entry and arrest of Rocchia. He knew nothing. When Goggin said, "It looks like you have the Big Shot," it was not said by reason of facts within Goggin's knowledge. Being without any such knowledge and a mere stranger, Rocchia was justified in ignoring the remarks. Furthermore, the statement of Goggin's was not made in the routine examination but was spontaneous and made promptly upon his entry. The conversation was clearly between those two persons and therefore Rocchia was not called upon to answer.

In *Commonwealth v. Kenny,* 12 Metcalf 235, 46 Am. Dec. 672:

> "Indictment against defendant for stealing a bag and some silver and copper coin, the property of one Russell. At the trial one Brewer testified that he was a keeper at the watch-house in Boston; that on the evening of September 5, 1846, two watchmen came in, bringing the defendant; that one of them said, 'Here is a man who has been robbing a man' * * *"

As to admissibility of evidence the court held as follows:

> "If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury and alike inconsistent with decorum and the rules of law. So, if the matter is something not within his knowledge, if the statement is made by a stranger, whom he is not called on to notice; or

if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from the silence. * * *

The declaration made by the officer, who first brought the defendant to the watch-house, he had certainly no occasion to reply to. * * * New trial granted."

In *State v. Young,* 12 S. W. 879, at 881, paragraph 2, it was held:

"There was error in admitting testimony as to what Craft said to Wilson, the marshal, to-wit:

'You have got your right man; you don't have to go any further to get him.' There are two reasons why the ruling was erroneous: (1) Because the defendant was under arrest, and therefore in no position to make any denial as to what Craft said in his presence. (Authorities cited); (2) Because the remark was made by a mere stranger in his presence, and not to him. (Authorities cited.) The defendant had the right, therefore, to treat the remark of Craft as mere impertinence and best answered by silence. * * * Judgment reversed."

Investigator Burt, at the time he arrested and searched the defendant, was waiting for the return of Investigators Goggin and DeKalb. When he returned the money, wallet and purse to the defendant it was no doubt his intention to have the other agents search him upon their return. It is significant to note that when the agents did return Goggin made the search and DeKalb counted the money. This was undoubtedly

done with the idea in mind that should they be called upon to testify that each of them would be able to say what was found and by repetition as each investigator took the stand, make the testimony more impressive in the minds of the jury. This was a clever way of building up evidence. When Goggin entered the still room and said to Burt, "It looks like you have the Big Shot," the natural reply was from Burt, who said, "Search him and see what you think," and he did. Rocchia was not part of this conversation nor was he intended to be. When the investigators did take the stand each of them repeated the conversation between Burt and Goggin as well as testifying as to what they found and with each repetition it gained greater significance and became more forcibly impressed in the minds of the jury. It was repeated solely for the purpose of influencing the jury in its deliberations upon the question of the defendant's guilt. Even with it all, there was some doubt in the minds of the jury as to the guilt of the defendant for they disagreed on the seventh count of said indictment charging conspiracy. (Tr. 7.) They returned a verdict of guilty on counts one to six, inclusive, charging generally possession of still and manufacturing. The statement of Investigator Goggin that "It looks like you have the Big Shot" no doubt was taken by the jury to mean that he was the operator of this particular still, and the man in possession and control thereof.

The question of the conduct of the defendant in relation to the statements made in his presence is a

delicate one and something more must appear than that Rocchia heard the statement. In *Di Carlo v. United States,* 6 Fed. (2) 364, it was held:

> "While the question is a delicate one, dependent largely upon the discretion of the trial judge, *nevertheless more must appear than that the defendant heard the statement.*"

A person on trial for his liberty is entitled to all the advantages which the laws give him and among them is the right to have his case submitted to an impartial jury upon competent evidence.

Having in mind the rules laid down above it is apparent that Investigator Goggin had no knowledge of the facts surrounding the arrest and search of the defendant Rocchia; that the statement was not based on a fact within the knowledge of Investigator Goggin but was purely a spontaneous assumption; that it was not addressed to the defendant; that it did not relate to the offense charged and arose in a conversation by and between third persons. Surely this statement was not properly admitted and under the circumstances it cannot be said that it was not the element which turned the scales.

In connection with this remark of Goggin's "It looks like you have the Big Shot," it must also be remembered that the fingerprint card (U. S. Exhibit 14) contained a prior criminal record, the disposition of which was not shown. The jury undoubtedly concluded that the defendant was an habitual offender and was no doubt the so-called "big shot" or owner and proprietor of the still.

In this connection it is also well to note the remarks of the United States Attorney in calling upon the defendant to produce certain papers (U. S. Exhibits 7 and 8) and the comment by the court that it was proper so to do. In view of these statements the failure of the defendant to produce such papers certainly influenced the jury in believing that the defendant Antonio Rocchia was the proprietor of the still or had some direct connection therewith. It is apparent that in the light of the facts of this case the defendant was prejudiced by the statement of Investigator Goggin when he referred to the defendant as the "big shot."

We respectfully submit that the verdict of the lower court should be reversed.

Dated, San Francisco,
May 27, 1935.

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